FILE COPY

No. 300

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1923

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

vs.

J. A. CZIZEK,
Respondent.

PETITION FOR REHEARING

RICHARD H. JOHNSON,
CAREY H. NIXON,
Boise, Idaho,
Counsel for Respondent.

SYRA-TOOKE CO., PRINTERS & BINDERS, BOISE

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The said J. A. Czizek, respondent, comes now and respectfully petitions this Honorable Court for a rehearing of said cause, for the following reasons, to-wit:

Because the Court inadvertently fell into an error as to certain *facts* in the record, which were not sufficiently stressed by counsel for respondent at the hearing. No question is or should be raised as to the law announced by the Court, but we feel that the Court, being human, may make a mistake as to facts, and that it has done so in this case. That it is our duty to call it to the Court's attention, and we feel that the

Court will willingly correct it before the mandate goes down.

There is no evidence whatever in the record that the receiving clerk, Margaret Brown, by inadvertence or otherwise, placed the telegram in suit in the file of earlier messages. The Company made a futile attempt to show this at the second trial. Margaret Brown did not testify at the trial, but a stipulation was filed (Tr., p. 120) as to what Margaret Holland, formerly Margaret Brown, would testify to, if called. She said (Tr., p. 121):

> "I was with the Company in November, 1917, as counter clerk. I do not remember anything regarding the nature of the message from T. J. Jones to J. A. Czizek at Oakland, California, nor do I recall the circumstances of its delivery to the Western Union office."

Her conjecture as to how she might have placed the message in the earlier files was stricken out by the Trial Court because she remembered nothing about it.

The testimony of Mr. Hackett, the Manager, was by stipulation in the same way. He said (Tr., p. 113):

> "I had no knowledge of the filing of the message involved in this action, nor of the fact that it had been misplaced, or that it failed in transmission, until the middle of February, 1918."

The statement, therefore, in petitioner's brief and urged at the argument, that Margaret Brown inadver-

tently placed the message in the earlier file, is not supported by the evidence, as was pointed out by the Circuit Court of Appeals. (Tr., pp. 147-48.)

As to the facts in the record relating to the answers to the two inquiries made by the sender, we respectfully call attention to the following. Mr. Hackett testified (Tr., p. 113):

> "All messages filed with the company each day are, at the close of the business for that day, checked over *to ascertain whether they have been properly transmitted.* This fact is ascertained by examining the check marks which are required to be placed upon each message by the operator who transmits it, which includes the initials of the operator sending the same and the time when the same is transmitted. After this check is made, the messages for the particular day are bound together and tied with a string and laid away for future reference." (Italics ours.)

When inquiry was made by Jones, the sender, on December 1, 1917, the day following the sending of the message (Tr., 90), he:

> "asked if there was a message there for Jones. She said 'no', and then I asked her if they had sent a telegram, to look through and see if a telegram had been sent to J. A. Czizek at Oakland."

(Objections and argument.)

On page 92, witness continued:

"She looked through some papers and files, and said the telegram had been sent. Well, Sunday came in and it was my opinion, if I remember right—it seems that the next day was Sunday, and on Sunday I went to the telegraph office again. I am positive it was Sunday—this being the first—the 30th was a Friday—Saturday was the first—the second was a Sunday. I guess I went on the third, a Monday, to the telegraph office and inquired if the telegram had been sent to J. A. Czizek, at Oakland, at which they looked through some more files, and the person behind the desk replied that J. A. Czizek had received the telegram, and with that I walked out."

The only records which the clerks should have examined to ascertain whether the message had been sent, was the package of messages sent on November 30th, and which were bound together at the close of that day and filed away for future reference. Had this been done the message would not have been found there, and it would have been apparent at once that it had not been sent. It could have been found in the earlier files as readily at that time, as in the middle of February following. We most respectfully urge that if any presumption is to be indulged in at all, it is more logical to assume that the clerks to whom the inquiries were made either did not care to be bothered about the matter, or, to cover up the mistake, deliberately told Jones that the message had been sent and

delivered. These employees of the Company had in their possession the only means of ascertaining the truth, while Jones had none.

These were clearly false statements and should be presumed, under these circumstances, to have been wilfully rather than inadvertently made, and to show such entire failure of duty which the Company owed to the sender, and as to raise the presumption of a conscious indifference to consequences.

This being true, under the principles announced by this Court in its opinion, respondent is not precluded from recovery. The Court did not adopt petitioner's contention as stated on page 3 of its reply brief, as follows:

> "These limitations were designed to, and do cover every conceivable default which can occur in connection with the transmission of a telegram."

Moreover, we respectfully submit, that if truthful answers had been made to the inquiries, it was not too late on December 1st or on December 3d, as suggested in the opinion, for the injury to respondent to have been avoided, as a telegram sent on the latter date would have been in time. Miller was ready, anxious and able on that date to purchase the stock and did purchase the Jones stock on the 3d of December (Tr., p. 65). His balance in the bank at the close of business on December 3d was $30,826.50, and on December 4th was $30,818.41 (Tr., p. 97).

We respectfully urge the Court to give due consideration to these facts and to the further fact that respondent was wholly free from any fault in the matter, and his agent, Jones, did everything possible to call the matter to the Company's attention in ample time to have avoided the damage.

It would seem, therefore, to conclusively follow, independently of the ruling that "non-delivery" includes "non-transmission", that under the rule announced in the opinion, in the presence of facts which, unexplained, raise a presumption of wilful or conscious neglect, respondent should be entitled to recover, regardless of the valuation clause, as held by the Circuit Court of Appeals. This question was not passed upon by this Honorable Court, due to a misapprehension of the facts as outlined above.

We further respectfully call attention to the fact that if the failure to insure a message excuses the negligence here shown, which is as great as any conceivable form of default, the Company owes no duty whatever to the public in relation to the other classes of messages, a privilege not enjoyed by any other carrier operating under classified rates and regulations.

Wherefore, your petitioner respectfully prays that an order may be made for a rehearing of the argument in this case, on a day to be appointed by this Court, at the present term, and upon such points as the Court

may direct, and that the mandate of this Court be stayed until after such hearing.

J. A. CZIZEK, *Petitioner.*

By RICHARD H. JOHNSON,
CAREY H. NIXON,
His Counsel.

BOISE, IDAHO, March 19, 1924.

CERTIFICATE OF COUNSEL

I, Richard H. Johnson, do hereby certify that I am one of the Counsel for Petitioner named in the foregoing petition for rehearing, that I have read the foregoing petition, and verily believe that the points raised therein are meritorious; that said petition is filed in good faith and not for the purpose of delay.

(Signed) RICHARD H. JOHNSON.